



STATE OF INDIANA

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January 10, 2013

John J. Ellis
1104 E. Southport Dr.
Terre Haute, Indiana 47802

Re: Formal Complaint 13-FC-06; Alleged Violation of the Access to Public Records Act by the Terre Haute Sewage Department

Dear Mr. Ellis:

This advisory opinion is in response to your formal complaint alleging the Terre Haute's Sewage Department ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Chou-il Lee, City Attorney, responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that the City has informed you that state law requires that property owners are responsible for a tenant's sewage bills. You contacted the City for information regarding who should be contacted at the state regarding this issue, to which you allege the City failed to provide you with any information. You further provide that you were denied access to certain sewage bills since you were not listed as the person responsible on the account. You are attempting to force the City to allow landowners access to the bills or have the new billing company either send the sewer bill to the property owner, or at a minimum, provide a duplicate copy.

In response to your formal complaint, the City advised that you have failed to indicate in your formal complaint in what manner the agency has violated the APRA. I.C. § 5-14-3-3(a)(2) provides that at the discretion of the agency, it may require that a public records request be made in writing. The City implemented this policy approximately eighteen years ago. The City does not require the request be made on a specific form, just that it be made in writing and provide the requisite information so that the records may be identified. In response to your request, Mr. Lee personally spoke with you on the telephone and explained to you the City's process for requesting and obtaining records. When you were informed of the fees associated with providing records under the APRA, you accused Mr. Lee of soliciting a bribe.

It is the City's position that you have not submitted a request for records; as such it has not violated any of the provisions of the APRA. In your conversations with the City, you have also yet to describe the records that you seek with reasonable particularity. You have requested information for "rental property", but the addresses of the properties were not provided. Lastly, the records you have sought for sewage invoices have yet to be generated. After addressing the issues contemplated under the APRA in response to your formal complaint, Mr. Lee outlined the issues you have raised regarding the handling of sewage bills by the City.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." *See* I.C. § 5-14-3-1. The City is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the agency's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

As an initial matter, I.C. § 5-14-4-10, the counselor has the authority to issue advisory opinions to interpret the public access laws upon the request of a person or public agency. A person denied the right to inspect or copy records pursuant to the APRA may file a formal complaint with the Public Access Counselor's Office. *See* I.C. § 5-14-5-6(2). Many of the issues that you have raised in your formal complaint are outside the purview of this office. I will only address those issues raised in your formal complaint where the allegation pertains to a violation of the APRA.

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). At the agency's discretion, a request to inspect and copy may be in writing or on a form provided by the agency. *See* I.C. § 5-14-3-3(a)(2). Mr. Lee has provided that it is the City's policy to require all requests for records be submitted in writing; a policy to which you were informed in a prior telephone conversation. As of the date your formal complaint was filed, the City has yet to receive a written request for records from you. Accordingly, it is my opinion that the City did not violate the APRA by requiring that a request for records be made in writing.

The APRA requires that a records request "identify with reasonable particularity the record being requested." I.C. § 5-14-3-3(a)(1). "Reasonable particularity" is not defined in the APRA, but the public access counselor has repeatedly opined that "when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity." *See Opinions of the Public Access Counselor 10-FC-57; 08-FC-176*. However, because the public policy of the APRA

favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* IC 5-14-3-1; *Opinions of the Public Access Counselor 02-FC-13; 05-FC-87; 11-FC-88*. The City has indicated your previous oral requests failed to identify the specific address for the properties that you had requested records for. Should you intend to file a written request for records with the City, you should provide to the City the respective identifying information for the properties involved.

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61; see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy...”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*. To the extent that you requested records that have yet to be generated, the City would not violate the APRA by failing to produce a record that does not exist.

CONCLUSION

For the foregoing reasons, it is my opinion that the City did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Chou-il Lee